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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1968

No. 1334

GOLTEN MARINE COMPANY, INC.,

Petitioner,

—against—

TRELLEBORGS ANGPARTYGS A/B, and
CHARLES McLAUGHLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Golten Marine Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on January 30, 1969, affirming judgments of the United States District Court for the Eastern District of New York holding petitioner liable to indemnify respondent, Trelleborgs Angpartygs A/B, *as a matter of law,* and dismissing petitioner's counterclaim against respondent, Charles McLaughlin.

Citations to Opinions Below

There was no opinion filed by the District Court.

The United States Court of Appeals for the Second Circuit filed an opinion which is not yet reported. Said opinion is, however, printed in the Appendix hereto (1a-9a).

Jurisdiction

The judgment of the Court of Appeals was entered on January 30, 1969 (Appendix p. 10a).

This petition for the issuance of a writ of certiorari is being filed within ninety (90) days after the entry of said judgment.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Constitutional Provision Involved

UNITED STATES CONSTITUTION, AMENDMENT VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law"

The Questions Presented

1. Where a shipboard accident has been caused 16⅔% by plaintiff's negligence and 83⅓% by Shipowner's negligence is the Shipowner entitled to recover indemnity *as a matter of law* from the plaintiff's employer merely by rea-

son of the plaintiff's contributory negligence having been imputed to the employer?

2. Was it not a denial of the employer's right to trial by jury to take away from the jury the question of whether Shipowner's negligence of 83⅓% constituted "conduct precluding indemnity"?

3. If a plaintiff's contributory negligence is imputed to his employer so as to make the latter liable as a matter of law to a shipowner, then should not the employer's liability be limited solely to that percentage of shipowner's damage for which it has been rendered vicariously liable?

4. Does *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952), 72 S.Ct. 277, insulate a shipowner against damages for its own independent wrongs to marine contractors; and, if so, then should not that decision and its rationale be re-examined for its applicability to the current maritime personal injury indemnity cases?

5. Where 83⅓% of the cause of an accident has been shipowner's negligence, does not a contractor have a cause of action against that shipowner for the damages sustained by him?

6. If an employer has been held liable to a shipowner *solely* because his employee's negligence has been imputed to him, does not such employer have a cause of action under the maritime law, as is the case under the common law, for indemnity against the negligent employee?

Statement of the Case

At its genesis, this was an action to recover damages for personal injuries, brought by the respondent, Charles McLaughlin, a marine rigger, against the respondent, Trelleborgs Angpartygs A/S (hereinafter Shipowner). Shipowner impleaded McLaughlin's employer, the petitioner, Golten Marine Company, Inc. (hereinafter Golten), seeking indemnity for the latter's alleged breach of the implied warranty of workmanlike performance (WWP) which it owed as a maritime contractor. Federal jurisdiction was predicated upon 28 U.S.C. § 1332 in view of the diverse citizenship between McLaughlin and Shipowner.

Golten had been engaged by Shipowner to perform considerable repair and overhaul work in the engine room of the LAKE ONTARIO while the said vessel lay at dock in Jersey City, New York. None of the work to be performed by Golten had anything whatever to do with the engine-room hoists. Needing some additional day labor on March 26, 1962, Golten hired two riggers, McLaughlin and Kewn, from a union hall. They reported to the vessel at approximately 1:00 p.m.; and their job was to remove some engine bearings from the ship to a truck that would haul them to Golten's shop for rebabbiting.

These bearings, which were oily and greasy, were loaded onto a hoist in the engine room. McLaughlin and Kewn then climbed ladders to the upper level of the engine room and sought to raise the loaded hoist to that level, so that from there they could manually carry the bearings off the ship. In working the chains of the hoist in their attempt to raise it to the upper platform level, they found that the hoist could not be elevated beyond the level of approximately 2½ feet below the platform. They neither reported this to the ship's officer or to Golten's foreman,

Erickson, nor explored other methods of removing the bearings. Instead, exercising his own judgment and making his own decision, McLaughlin climbed into the hoist to hand the bearings out to Kewn. To do so, he necessarily had to stand on top of the greasy engine bearings.

As McLaughlin picked up a particular bearing and turned to hand it to Kewn, he slipped on the bearings and fell against the safety bar of the hoist. This came out of its slots and McLaughlin fell to the engine-room floor.

This was the first use of the hoist by any Golten employee. Golten's foreman, Erickson, called as a witness by the plaintiff, testified to having found the hoist approximately two feet below the platform level after learning of the accident. He confirmed that he had received no report before the accident of anything wrong with the hoist. He further testified that McLaughlin should have reported his difficulty with the hoist to him so that he could have repaired the hoist, and, most importantly, that it was not safe for McLaughlin to have descended into the hoist when it failed to come up to platform level.

Pursuant to the ruling of the Trial Judge, a verdict was to be obtained first on the principal case of McLaughlin against Shipowner. In summation, counsel for Shipowner argued the contributory negligence of McLaughlin in descending into the hoist and standing upon the greasy bearings. The jury was then charged that if in doing those things McLaughlin did not act as a reasonably prudent rigger he might be found contributorily negligent.

In a special verdict (Appendix p. 11a-12a), the jury found (a) that Shipowner was negligent, (b) that Shipowner breached its warranty of seaworthiness, (c) that said negligence and breach of warranty proximately caused McLaughlin's injuries, (d) that McLaughlin's damages were

$12,000.00, (e) that McLaughlin was contributorily negligent in the amount of $2,000.00, and (f) was thus entitled to recover only $10,000.00 from Shipowner.

The finding of contributory negligence on the part of McLaughlin was considered by the Trial Judge to conclusively establish Shipowner's right to recover full indemnity from Golten as a matter of law. Accordingly, he directed a verdict in favor of Shipowner against Golten for $10,000.00 plus the taxed costs and for $3,500.00, the agreed amount of Shipowner's attorneys fees and disbursements in defending against McLaughlin's claim.

Although Golten was thus being held liable as a matter of law to Shipowner for the imputed negligence of McLaughlin (in a situation whereby McLaughlin's negligence was only 16⅔% of the whole and Shipowner's negligence was 83⅓%), the award against Golten was not reduced to reflect an offset for Shipowner's own fault, as sought by Golten in its counterclaim against Shipowner; and Golten's other counterclaim against McLaughlin, whose negligence, imputed to Golten, rendered it liable to Shipowner, was dismissed.

The determinations that as matters of law (a) Golten was obligated to indemnify Shipowner and (b) was entitled to no relief on either its counterclaim against Shipowner or its counterclaim against McLaughlin, were each affirmed by the Court of Appeals in its opinion of January 30, 1969 (Appendix p. 1a-9a).

Thus, in its present posture, this case presents the picture of three parties who, as a matter of law, have been subjected to damages in an *inverse proportion* to their fault. The major fault herein lies with Shipowner which was found by the jury to have been responsible for $10,000.00 of the $12,000.00 damages sustained by Mc-

Laughlin, or 83⅓% negligent. McLaughlin was found by the jury to have been at fault for only $2,000.00, or 16⅔%. Golten's fault could only be equal in quantity to McLaughlin's, and was of a lesser quality since it was only a derivative or vicarious fault.

However, as a result of what both the Trial Judge and the Court of Appeals considered to be governing rules of law, Golten, the party least at fault herein, has had damages imposed upon it in the amount of $13,500.00. McLaughlin, who was only at fault for $2,000.00, or 16⅔%, loses only that precise amount from his damages. But Shipowner, the major tortfeasor herein, responsible for $10,000.00, or 83⅓% of the total damages, has not only been granted full indemnity but has been awarded an additional $3,500.00 for defending against a claim caused in major part by its own fault.

REASONS FOR GRANTING THE WRIT

I.

Review of this case should be had to halt a growing conflict between decisions of the Court below and those of this Court, and to prevent denial to petitioner of its constitutional right to trial by jury.

(a) With Regard to the Shipowner's Claim for Indemnity:

The matter of indemnity in maritime personal injury cases embraces two separate and distinct issues. It must initially be determined whether the putative indemnitor breached the warranty of workmanlike performance (WWP); and, if so, was the conduct of the indemnitee such as to preclude indemnity. This Court has held such issues to be for jury consideration. Thus, in *Weyerhaeuser S.S. Co.*

v. *Nacirema Operating Co.*, 355 U.S. 563, 567, 78 S. Ct. 438, 441 (1958), it was declared that

> "The evidence bearing on these issues * * * was for jury consideration under appropriate instructions."

That a Shipowner's claim for indemnity was for jury determination was once again the holding of this Court in *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355, 82 S. Ct. 780 (1962). The principle was recently reiterated and a contrary judgment of the United States Court of Appeals Second Circuit was summarily reversed in *International Terminal Operating Co., Inc.* v. *N. V. Nederl. Amerik Stoomv. Maats*, 393 U.S. 74, 89 S. Ct. 53 (1968).

Yet, notwithstanding the clear mandate of this Court, the District Court took these issues from the jury and resolved them as questions of law. This procedure was affirmed by the Court of Appeals. By such action, petitioner was deprived of its constitutional right to trial by jury on issues declared by this Court to be for jury consideration.

It will undoubtedly be argued that since McLaughlin's contributory negligence of 16⅔% had been fixed by the jury, the indemnity issue was in reality jury resolved. But any such argument (which has other flaws) completely overlooks the fact that the jury was never given an opportunity to consider whether the Shipowner's negligence amounting to 83⅓% was such as to preclude indemnity.

Evaluation of a shipowner's conduct by the fact finder involves a "weighing process", *Waterman Steamship Corporation* v. *David*, 353 F. 2d 660 (5 Cir.). Your Petitioner was entitled to have the jury weigh the imputed 16⅔% of McLaughlin's negligence with the Shipowner's 83⅓%

and determine whether under these circumstances indemnity was warranted.

(b) With Regard to Golten's Counterclaim Against the Shipowner:

In its counterclaim against Shipowner Golten pleaded, *inter alia*, that any liability on its part would be caused, in whole or in part, by Shipowner's active and affirmative negligence and fault and its breach of the warranty of seaworthiness; and Golten thereby sought judgment against Shipowner:

> "* * * for an amount equal to the extent that any liability on the part of the third-party defendant (Golten) was caused, brought about or contributed to by said third-party plaintiff (Shipowner) * * *."

In both *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 568, 78 S. Ct. 438 (1958), and in *Kermerac* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 632, 79 S. Ct. 406, 410 (1959), reference was made to the duty owed by a shipowner to a contractor invited aboard the vessel. Only recently in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., Ltd.*, —— U.S. ——, 37 L.W. 4271 (4/1/69) did this Court re-iterate (4275):

> "We hold only that federal maritime law does impose on the shipowner a duty to the stevedoring contractor of due care under the circumstances, and does recognize a direct action in tort against the shipowner * * *."

This Court in the cited case then went on to recognize that the counterclaim against the shipowner was predicated upon its *independent wrong* to the contractor. The shipowner's argument that its tortious conduct may be used only as a shield to preclude indemnity but not as a sword

compelling payment of damages for that tortious conduct was expressly rejected by this Court.

Further, this Court in *Burnside, supra*, also held that the fact that the contractor has a direct action in tort against the shipowner does not preclude additional direct actions against the shipowner by the contractor under other theories. It made clear that the proscription, set forth in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U.S. 124, 76 St. Ct. 232 (1956), against the use of the theories of "active" or "passive" as well as "primary" or "secondary" negligence was appropriate only to the shipowner's claim for indemnity against the contractor, but was in no wise applicable to the contractor's action against the shipowner.

In view of the fact that the jury in the instant case found the shipowner 83⅓% at fault, there was at the very least a prima-facie case established on Golten's counterclaim against the Shipowner. By holding Golten liable to indemnify the Shipowner for all of McLaughlin's recovery plus $3,500.00 in counsel fees, *all as a matter of law*, the Courts below completely deprived Golten of its right to have a jury pass upon its counterclaim for damages against the Shipowner which Shipowner had already been found by that jury to have been 83⅓% at fault in the accident. Such counterclaim could have provided Golten with an offset of at least 83⅓% of the judgment entered against it, and possibly even more in view of the fact that its liability was wholly vicarious.

The marvelous inconsistency in what the Trial Judge did, and of what the Court of Appeals affirmed, is that they determined as a matter of law that the jury finding of 16⅔% contributory negligence on the part of McLaughlin made Golten liable to the Shipowner on the Shipowner's

claim for indemnity, *but refused to use that same jury's finding of 83⅓% negligence on the part of the Shipowner to grant Golten recovery on its counterclaim against the Shipowner.* Nor would they permit the issues between the Shipowner and Golten to be presented to the jury.

Undoubtedly this exquisite inconsistency was in part responsible for the use of the term "wonderland" by the Court of Appeals in describing this area of law. However, the Court of Appeals erred in attributing that "wonderland" to the decision of this Court in *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952). For, as this Court makes most clear in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., Ltd., supra*, the contractor's counterclaim against the shipowner is not an action for contribution, but springs rather from a breach by the shipowner of the *independent duties* which it owes to the contractor.

The conflict between the law fashioned by this Court and its misinterpretation and misapplication by inferior Courts, resulting in a deprivation of constitutionally guaranteed rights, cries out for review by this Court.

II.

There is both an inter and intra circuit conflict and inconsistency on various issues presented in this case.

(a) Regarding Imputation of the Plaintiff's Contributory Negligence to the Impleaded Employer:

As evidenced by the instant decision and that in *Mortensen* v. *A/S Glittre*, 348 F. 2d 382 (2 Cir. 1965), the United States Court of Appeals for the Second Circuit is of the view that a plaintiff's contributory negligence benefits a shipowner not only by a proportionate reduction of the plaintiff's recovery, but by also providing the shipowner with a springboard for automatic indemnity from the impleaded employer. (It should be noted that in *Cavelleri* v. *Isthmian Lines*, 189 F. Supp. 525 and 190 F. Supp. 801, the then District Judge Kaufman was of the view that such contributory negligence would be completely "excised" from the case upon the diminution of the plaintiff's recovery and could not thereafter become the basis for the employer's indemnity liability to the shipowner. It is that view which seems to have been excised by subsequent decisions.)

However, the United States Court of Appeals for the Fifth Circuit is of the view that the contributory negligence of a plaintiff may not be imputed to the employer so as to render that employer liable to indemnify a third party. See *Drewery* v. *Daspit Bros. Marine Divers, Inc.*, 317 F. 2d 425 (5 Cir. 1963), and *Loffland Bros. Co.* v. *Roberts*, 386 F. 2d 540 (5 Cir. 1967). See, too, *Maples' Case*, 1966 A.M.C. 2032, 2035 (S.D. Tex. 1966).

(b) With Regard to the Counterclaim Against the Plaintiff:

Notwithstanding that Golten was held liable to the Shipowner only because McLaughlin's contributory negligence

of 16⅔% was imputed to it, the Court below affirmed the dismissal of Golten's counterclaim against McLaughlin on the basis of *Nicroli* v. *Den Norske, et al*, 332 F. 2d 656 (2 Cir. 1964). However, the same Second Circuit held in *Horton* v. *Moore-McCormack Lines, Inc.*, 326 F. 2nd 104 (2 Cir. 1964), that a maritime employer was entitled to recover full indemnity from its employee whose breach of his "implied agreement to perform his duties in a proper and workmanlike manner" cast the employer into liability to a third party. See, too, Footnote 1 of the dissenting opinion in *Schenker* v. *U. S.*, 322 F. 2d 622, 630 (2 Cir. 1963).

An employee's obligation to his employer to perform his job in a workmanlike manner exists in the 5th Circuit, see *Holmes* v. *Mississippi Shipping Company*, 301 F. 2d 474, 481 (5 Cir. 1962).

The 10th Circuit recognizes the employee's obligation to indemnify an employer held liable to a third person solely because of such employee's negligence and, in *Thomas* v. *Malco Refineries*, 214 F. 2d 884, 886 (10 Cir. 1954), has stated the rule as follows:

> "In cases where the wrongful act or omission of a person causes injuries to another, and a second person, *guilty only of imputed or constructive wrong*, because of his legal relationship to the primary wrongdoer or his positive legal duty to the person injured, is also liable to the latter for the damages suffered, and such second person has discharged such liability, he is entitled to indemnity from the primary wrongdoer for the entire amount paid to discharge such liability. *The principle applies where an employer under the doctrine of respondeat superior is compelled to pay damages to a third person solely because of the negligence or other wrongful act of his employee.*" (Italics added)

Indeed, the duty of an employee to reimburse his employer for damages sustained by the employer due to the employee's negligence has become hornbook law. See 42 *Corpus Juris Secundum,* pages 597-598; *Harper and James, The Law of Torts,* 1363 (1956); *Prosser on Torts, Second Edition* (1955), page 250, § 46; and *Restatement of Restitution,* § 96.

There is nothing contained in the *Longshoremen's and Harbor Workers' Compensation Act,* 33 U. S. Ct., § 901 et seq., which in any way deprives the employer of a right to recover indemnity from an employe whose negligence has cast the employer into liability to a third party. The rights and obligations granted to parties under the Act did not exclude all other rights and obligations between the parties, see *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., Ltd.,* —— U.S. ——, 37 L.W. 4271 (4/1/69).

Golten's liability to the Shipowner in the instant case came about solely, and as a matter of law, because McLaughlin's contributory negligence was imputed to it. To dismiss Golten's counterclaim for indemnity against McLaughlin is, under these circumstances, a clear conflict with the law of other Circuits, with hornbook law, and with the maritime law of the Second Circuit itself, as exemplified in *Horton,* supra.

III.

The instant case presents the ideal vehicle for this Court to render the clarification sought by courts, counsel and litigants in the presently chaotic state of the maritime personal injury indemnity law.

Termed a "wonderland" by the Court below, a "Donnybrook Fair" in *D/S Ove Skou* v. *Hebert,* 365 F. 2d 341, 344 (5 Cir. 1966), and a "Tar Baby" by Proudfoot in *20 Stan. L.Rev.* 423 (1968), there can be little doubt of the need for review by this Court of the issues involved in the field of maritime personal injury indemnity actions. Presenting, as it does, virtually all of those issues, the instant case is the ideal vehicle for the clarification so desperately required.

The anomaly of inferior Courts fashioning law so as to impose damages in inverse ratio to fault has perhaps reached its zenith in the instant case. The shipowner, who was most at fault in view of a jury verdict finding it negligent to the extent of 83⅓%, has benefited the most from this litigaiton by having been awarded not only full indemnity for McLaughlin's judgment but by also having been awarded its counsel fees and expenses of defense. McLaughlin, less at fault than the Shipowner in view of a jury finding of only 16⅔% contributory negligence, has his damages mitigated by the extent of his negligence (whereas the Shipowner did not) and must also pay his own attorney's fees. Golten, only vicariously liable because of the imputation to it of McLaughlin's contributory negligence, ends up by paying all of McLaughlin's recovery and by also having to pay the Shipowner's attorney's fees as well as its own. It is to this ridiculous extent that various inferior Courts have propelled this Court's state-

ment in *Italia Societa* v. *Oregon Stevedoring Company,* 376 U.S. 315 (1964), that "liability should fall upon the party best constituted to adopt preventive measures and thereby to reduce the likelihood of injury."

The extreme, illogical and inequitable result, reached in the instant case by Courts purportedly attempting to carry out that philosophy, is, upon analysis, contrary to its purpose. In the instant case, there is nothing Golten could have done to have prevented McLaughlin from making his own judgment and descending into the hoist to pass the bearings out to Kewn. But, there is considerable that the Shipowner could have done to have made the hoist safe for use so that it would have come up to the level of the platform and so that its safety bars would function better. The fact that the Shipowner gets off scot-free and is even reimbursed its attorney's fees and expenses for defending against an accident, caused by its negligence of 83⅓%, is certainly no inducement to it to more carefully maintain its equipment and is certainly no incentive for it to adopt preventive measures to reduce the likelihood of further accidents.

As indicated earlier in this petition, the Court below ascribes this "wonderland" to this Court's decision in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282 (1952), which your petitioner believes it misinterprets with the result that it precludes recovery by petitioner on its counterclaim against the Shipowner. The error, committed by the Court of Appeals in its affirmance, is, we submit, demonstrated clearly by the decision of this Court in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., Ltd.,* — —U.S. ——, 37 L.W. 427 (4/1/69). If, however, petitioner be wrong in its view of the non-effect of *Halcyon* upon the situation at hand, then it is submitted that *Halcyon* should be reviewed by this Court

for a policy declaration as to whether its principles are intended to apply to the recently developed maritime personal injury indemnity field.

In the law of Admiralty which recognizes comparative negligence and divided damages, the *Halcyon* rule prohibiting a division of damages between shipowner and contractor in proportion to fault is an anomaly. Indeed, its vitality in the area of maritime personal injury indemnity actions, developing since *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, has been seriously questioned in *Gilmore & Black, The Law of Admiralty*, p. 371 as follows:

> "Despite Justice Burton's disclaimer, it is obvious that Ryan by its approval of the indemnity cases, *strips Halcyon of any surviving vitality.* In the framework of harbor-worker litigation, there are simply no cases left for the Halcyon rule to apply to unless it be imagined that the harbor-worker's employer was a trespasser on the ship; in all other cases the existence of the contract between employer and shipowner leads automatically to the implied promise by employer to indemnify shipowner." (Italics added)

Additional authority to the effect that *Halcyon* is of doubtful authority today, if not indeed stripped of all vitality, is to be found in *Grace Lines, Inc.* v. *Port Everglades Terminal Co.*, 324 F. 2d 699 (5 Cir. 1963). See, too, *Weyerhaeuser Steamship Company* v. *U.S.*, 373 U.S. 597, 83 S. Ct. 926, and *Treadwell Construction Co.* v. *U.S.*, 372 U.S. 772, 83 S. Ct. 1102.

It should be obvious that incentive to prevent injury can best be promoted by making parties respond in damages to the extent that their fault caused the injury Such practical businessman's deterrent from negligence will best

serve the interests of society and would require apportionment of damages between shipowner and the impleaded contractor in accordance with their respective degree of fault as has been done in *Chevis* v. *Luckenbach Overseas Corp.*, 228 F. Supp. 642, and *Jones* v. *S.S. Jesse Lykes*, 253 F. Supp. 368.

Indeed, in *D/S Ove Skou* v. *Hebert*, 365 F. 2d 341 (5 Cir. 1966), a learned and experienced maritime Judge stated that the Court was *not* undertaking to rule that "there may never be an acceptable, equitable basis for distributing the burden of a loss resulting from the operational cooperation of breaches or wrongs of several parties". Circuit Judge John R. Brown then stated in a most pertinent footnote as follows (365 F. 2d 351):

> "18. Assuming, as some knowledgeable persons doubt, Gilmore & Black, Admiralty, p. 371 (1957); Grace Lines, Inc. v. Port Everglades Term. Co., 5 Cir., 1963, 324 F. 2d 699, 701, that in a practical way there is any practical vitality in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 1952, 342 U.S. 282, 72 S. Ct. 277, 96 L.Ed. 318, we do not think this outlaws for all time judicial improvisation in the accommodation of this dynamic Sieracki-Ryan-Yaka-Italia concept. Difficult as it conceptually is to read out handy, everyday notions of prudence, due care on the ground that tort principles as such are not pertinent, Italia Societa v. Oregon Stevedoring Co., 1964, 376 U.S. 315, 84 S. Ct. 748, 11 L.Ed. 2d 732, the process is inevitably a comparative one (see Pettus v. Grace Line, Inc., 2 Cir., 1962, 305 F. 2d 151, supra) perhaps justifying comparative techniques sometimes."

In Proudfoot, *"The Tar Baby": Maritime-Personal Injury Indemnity Actions,* 20 Stan. L.Rev. 423 (1968), there is an excellent academic discussion of the problems actually presented by the instant case. These problems, involving a contractor's counterclaim against a shipowner, an employer's counterclaim against a negligent employee, the right to jury trial of what this Court has declared factual issues, and the vitality and applicability of *Halcyon* to the subsequently developed field of maritime personal injury indemnity actions require policy determinations and clarification by this Court.

It is respectfully submitted that this petition for certiorari should be granted so that the anomaly and inequity now prevailing through misunderstanding can be clarified by appropriate policy declarations by this Court.

CONCLUSION

By reason of the foregoing, it is respectfully submitted that the petition herein should be granted and a writ of certiorari should be issued to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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JOSEPH ARTHUR COHEN
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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 51—September Term, 1968

Argued December 2, 1968 Decided January 30, 1969

Docket No. 30837

CHARLES MCLAUGHLIN,

Plaintiff-Appellee,

TRELLEBORGS ANGFARTYGS A/B,

Defendant and Third-Party Plaintiff-Appellee,

GOLTEN MARINE COMPANY, INC.,

Third-Party Defendant-Appellant.

Before LUMBARD, Chief Judge, FRIENDLY, Circuit Judge, and RYAN, District Judge.*

Appeal by a ship repairman from judgments of the District Court for the Eastern District of New York, Jacob Mishler, Judge, granting indemnity to a shipowner in respect of a personal-injury recovery against it by the repairman's employee and dismissing the repairman's counterclaim against the employee. Affirmed.

Joseph Arthur Cohen (Alexander, Ash & Schwartz, New York, N.Y.; Sidney A. Schwartz, of Counsel), for Third-Party Defendant-Appellant.

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* Of the Southern District of New York, sitting by designation.

Robert Klonsky (DiConstanzo & Klonsky, Brooklyn, N.Y.), for Plaintiff-Appellee.

William P. Kain, Jr. (Haight, Gardner, Poor & Havens, New York, N.Y.; Joseph V. Fleming, of Counsel), for Defendant and Third-Party Plaintiff-Appellee.

FRIENDLY, *Circuit Judge*:

This action in the District Court for the Eastern District of New York, in which federal jurisdiction was predicated on diverse citizenship, 28 U.S.C. § 1332, was brought by McLaughlin, a rigger employed by Golten Marine Company, against Trelleborgs Angfartygs A/B, owner of the freighter Lake Ontario, to recover for injuries caused by unseaworthiness of the vessel and Trelleborgs' negligence. Trelleborgs impleaded Golten. A jury brought in a special verdict that the ship was unseaworthy and Trelleborgs was negligent; that McLaughlin's damages were $12,000; that he had been contributorily negligent; that his damages should accordingly be reduced by $2,000; and that he should recover $10,000 against Trelleborgs. Question then arose as to Trelleborgs' claim for indemnity. Judge Mishler, relying on Mortensen v. A/S Glittre, 348 F.2d 382 (2 Cir. 1965), considered that the finding of contributory negligence on the part of McLaughlin was conclusive of Golten's breach of its warranty of workmanlike performance (WWP) and required a recovery in the absence of evidence that Trelleborgs had prevented Golten from fulfilling its obligation. Accordingly he directed a verdict in favor of Trelleborgs on its third-party claim for $10,000 plus the taxed costs and $3,500, the agreed amount of Trelleborgs' attorneys' fees and disbursements in defending against

McLaughlin's claim; he did not reduce this recovery to reflect comparative fault as requested in a counterclaim Golten had pleaded against Trelleborgs. He also dismissed another counterclaim wherein Golten had sought indemnity from McLaughlin for any liability it might incur by reason of his negligence. This last ruling was demanded by Nicroli v. Den Norske Afrika-OG Australielinie, 332 F.2d 656 (2 Cir. 1964), and we shall say no more concerning the portion of Golten's appeal that relates to it.

Trelleborgs had engaged Golten to perform repair and overhaul work in the engine room of the Lake Ontario while she lay at dock in Jersey City, N.J. Needing additional help, Golten employed two riggers, McLaughlin and Kewn, at a union hiring hall. They reported to the vessel around 1 P.M.; their job was to move some engine bearings from the ship to a truck that would haul them to Golten's machine shop.

The bearings, which were oily and greasy, were lying on the floor plates of the engine room near a hoist that ran up to a platform giving access to an upper passageway and, we assume, an exit from the ship. Erickson, Golten's foreman, instructed the men to use the hoist. Kewn placed the bearings in it and went to the platform to raise it; he was joined there by McLaughlin. They found that the hoist could not be elevated beyond a level some 2½′ below the platform. They did not report this to the ship's officers or to Erickson or explore other methods of removing the bearings, such as lowering the hoist to the floor and moving the bearings to another one. Instead, McLaughlin decided to climb into the hoist and hand the bearings out to Kewn. While attempting to do this, he slipped on the bearings and fell against the safety bar

of the hoist. This came out of its slots and McLaughlin fell to the engine room floor.

In *Mortensen, supra,* 348 F.2d 383, this court sustained the direction of a verdict on a ship's third-party claim against the employer of an injured plaintiff whom the jury had found guilty of contributory negligence. Golten attempts to distinguish *Mortensen* on the facts. In the alternative, it argues that if we should disagree on that score, the result here—where, as Golten puts it, the ship, which was found to have five-sixths of the responsibility for the accident, has succeeded in placing the entire liability plus its expenses on an otherwise guiltless employer of the man who was found to be only one-sixth responsible—is so manifestly unjust that something in the picture must be wrong.

The asserted distinction is that the employee in *Mortensen* had noticed the oil slick that caused the accident almost two hours earlier, and the employer, with this knowledge imputed to him, thus breached its WWP in failing to remedy the dangerous condition. See Drago v. A/S Inger, 305 F.2d 139, 142 (2 Cir. 1962); Nicroli v. Den Norske Afrika-OG Australielinie, *supra,* 332 F.2d at 656. In contrast we held in Calderola v. Cunard S.S. Co., 279 F.2d 475 (2 Cir. 1960) and Orlando v. Prudential S.S. Corp., 313 F.2d 822, 824 (2 Cir. 1963),[1] that a stevedore could not be cast in liability for failure to correct a dangerous condition when the employee had become aware of the danger only momentarily before the accident. If Golten could be held liable to the ship solely for failure to have the hoist put in proper order or to direct McLaughlin not to enter it, this distinction of *Mortensen*

[1] In neither case was it found that the employee was guilty of contributory negligence.

might well have merit. However, while a stevedore or other third-party defendant can undoubtedly be held for failure to correct a hazardous condition or prevent its employees from exposing themselves to danger of which it has knowledge, actual or imputed, that is neither the theory of *Mortensen* nor the full measure of the liability the Supreme Court has established.

The rationale of *Mortensen* was rather that the jury's finding of contributory negligence by the third-party defendant's employee was conclusive of breach of the defendant's WWP. This followed logically from an earlier holding of ours that a finding that an injured longshoreman had negligently exposed himself to danger required entry of a judgment for indemnity, even though the employer had no real opportunity for control. *Damanti* v. *A/S Inger*, 314 F.2d 395 (2 Cir. 1963).[2] See also *Shenker* v. *United States*, 322 F.2d 622, 628-29 (2 Cir. 1963) [express warranty]; *Nicroli* v. *Den Norske Afrika-OG Australielinie*, *supra*, 332 F.2d at 656.

The *Damanti* and *Mortensen* holdings apparently rested on an imputation of the employee's contributory negligence to his employer, which was thought to render the employer negligent as a matter of law. If there had been no other developments in the law of this subject, we might indeed wonder whether it might not be useful to have that position reexamined by the court *in banc*. The similarity in name between negligence and contributory negligence masks an essential difference in concept. Whereas negligence is a breach of a duty to others and gives rise to a right in the person injured, contributory negligence is simply a dis-

[2] The finding in *Damanti* had been on a trial of the indemnity claim rather than of the personal-injury claim, which the ship had settled.

ability preventing a plaintiff from recovering. See Restatement of Torts 2d § 463 (1965); 2 Harper & James, Torts § 22.10 (1956); Prosser, Torts § 64 (2d ed. 1964). A rule whereby the employee's disability automatically creates a right in the shipowner to be indemnified by the employer can thus be sound only if the employer is deemed to have undertaken not simply to use reasonable care to select, train and supervise employees so that they will protect themselves, but to furnish employees who in fact will not negligently expose themselves to injury. If the warranty were only of the more limited sort, the contributory negligence of an employee, although some evidence of breach, would not alone support a verdict in favor of the indemnitee, let alone the direction of one.

We think, however, that, under *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964), the WWP is not so limited. The issue there was whether the warranty of workmanlike service "is breached where the stevedore has non-negligently supplied defective equipment which injures one of its employees during the course of stevedoring operations." 376 U.S. at 315-16. The Court held it was. True Mr. Justice White stated that "the implied warranty to supply reasonably safe equipment may be satisfied with less than absolutely perfect equipment," 376 U.S. at 321, and annotated this with a citation of our *Calderola* and *Orlando* decisions, see fn. 1. However, the Court went on to say that the standard was "whether the equipment was in fact safe and fit for its intended use" and that it did not "believe a rope designed to withstand three to five times the pressure exerted on it when it gave way satisfies the standard of reasonable safety." 376 U.S. at 322. We see no reason to suppose that the *Italia* doctrine applies only to material and not to human resources; indeed, the Court's

footnote reference to *Calderola* and *Orlando*, 376 U.S. at 321 n. 8, in support of a statement concerning equipment would not have been pertinent unless the Court considered that personnel should be treated on the same basis as rope. Putting the *Italia* criteria in human terms, while Golten did not warrant a perfect rigger, it did warrant one who would not in fact be negligent. Again, paraphrasing *Italia*, we do not consider that a rigger who stepped onto a set of oily and greasy bearings on a hoist suspended in mid-air was "safe and fit" to work on the ship or "satisfies the standard of reasonable safety." When we go behind the Court's statements to the reason given for them, namely, that "where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not," 376 U.S. at 324, we see no basis for a different rule regarding personnel. Golten hired McLaughlin and put him to work; the ship was not consulted. While it might have been impractical for Golten to take measures that would have prevented McLaughlin's negligence, the law in this area charges the employer with the results of employee carelessness so that the decision on what precautions to take will be made upon a weighing of all relevant costs. See Proudfoot, "The Tar Baby": Maritime Personal-Injury Indemnity Actions, 20 Stan. L.Rev. 423, 433-34 (1968).

We have considered whether a different view is required by the Supreme Court's recent summary reversal, *International Terminal Operating Co.* v. *N.V. Nederl. Stoomv. Maats.*, —— U.S. —— (1968), 37 L.W. 3150-51, see also —— U.S. ——, 37 L.W. 3219, of our decision in that case, 392 F.2d 763. We do not think so. The issue in *International Terminal* was whether the stevedore had breached

its WWP when its hatch boss allowed work to continue temporarily in an ill-ventilated hold on the faith of a promise by a ship's officer to activate a concededly adequate ventilating system. The jury, in response to a special interrogatory, had found that the hatch boss acted reasonably. The Supreme Court reversed a ruling by a divided panel of this court that the hatch boss acted unreasonably as a matter of law; it held that the issue of the propriety of his conduct was one of fact on which the jury's determination should not have been disturbed. We are reversing no jury determination here; the jury has found that McLaughlin acted unreasonably.

Golten's remaining point is that even if all this is so, we ought to be sufficiently resourceful to find some way to avoid the apparently irrational result whereby a shipowner who supplied a defective hoist emerges scot-free and a repairman who did nothing more than innocently recruit a careless workman from a hiring hall pays the full bill for the workman's injury and the ship's defense against his claim. It is true that a desire to find some solution for the problem stemming from *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), has led members of this court to indulge in occasional murmuring about a counterclaim by the stevedore against the ship, based presumably on the ship's breach of an implied warranty to the stevedore to supply a ship where the stevedore's employees could work in reasonable safety. See *Pettus* v. *Grace Line, Inc.*, 305 F.2d 151, 156 (2 Cir. 1962) (Clark, J., dissenting); *Williams* v. *Pennsylvania RR.*, 313 F.2d 203, 213 (2 Cir. 1963) (Friendly, J.). More recently, the Fifth Circuit, speaking through a judge with long experience in admiralty, said it was not "undertaking to rule for all time that in the adjustment of these complex warranties and

counter warranties or promises, there may never be an acceptable, equitable basis for distributing the burden of a loss resulting from the operational cooperation of breaches or wrongs of several parties. . . ." *D/S Ove Skou* v. *Hebert*, 365 F.2d 341, 350-51 & n. 18 (1966) (John R. Brown, J.). What impresses us is that despite such expressions of desire, no court of appeals has undertaken to make them real. See Proudfoot, *supra*, 20 Stan. L.Rev. at 442-45. Probably that is as it should be. So long as *Halycon* v. *Haenn, supra,* 342 U.S. 282, remains on the books, inferior federal courts will do better to abstain from further adventures in this wonderland and leave doctrinal development to the Supreme Court, unless current congressional interest in the complex problems arising from the creation of a new class of land-based seamen by the *Sieracki* decision, 328 U.S. 85 (1946), should result in the knot being cut in a more drastic fashion.

Affirmed.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of January, one thousand nine hundred and sixty-nine.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HENRY J. FRIENDLY,
Circuit Judge,

HON. SYLVESTER J. RYAN,
District Judge.

[SAME TITLE]

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DAVID FUSARO
Clerk

Special Verdict

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 62-C-1131

FILED
in Clerk's Office
U. S. District Court, E.D. N.Y.
JUNE 10, 1966

CHARLES MCLAUGHLIN,

Plaintiff,

—against—

TRELLEBORGS ANGFARTYGS A/B,

Defendant and Third-Party Plaintiff,

—against—

GOLTEN MARINE COMPANY, INC.,

Third-Party Defendant.

SPECIAL VERDICT

1(a) Was defendant negligent?

Yes X
No .....

(b) Did defendant breach its warranty of seaworthiness?

Yes X
No .....

[Answer with X mark]

Special Verdict

If the answer to both questions is "NO"—do not answer any of the following questions:

2. Did the negligence or breach of the warranty of seaworthiness proximately cause the claimed injuries?

Yes X
No .....

[Answer with X mark]

If the answer to the above question is "NO"—do not answer the following questions:

3. The amount of plaintiff's damages is $12,000.00.

4. Was plaintiff contributorily negligent?

Yes X
No .....

[Answer with X mark]

Do not answer the following question if the answer is "NO":

5. Plaintiff was contributorily negligent in the sum of $2,000.00.

6. THE JURY FINDS FOR THE PLAINTIFF AND AGAINST THE DEFENDANT IN THE SUM OF $10,000.00.*

Dated: June 10, 1965

GEORGE J. ANDERSON
Foreman

*In fixing this amount deduct the amount found in 5 from the amount found in 3.

Judgment of the District Court

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK
Civil Action File No. 62-C-1131

FILED
JUNE 10, 1966

CHARLES MCLAUGHLIN,
—against—

TRELLBORGS ANGFORTYGS A/B.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Jacob Mishler, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in favor of the Pltf. Charles McLaughlin.

It is Ordered and Adjudged that Plaintiff, Charles McLaughlin, recover of the Defendant Trellborgs Angfortygs A/B the sum of $10,000.00 together with Costs when taxed.

Dated at Brooklyn, New York. this 10th day of June, 1966.

LEWIS ORGEL
Clerk of Court

by MICHAEL J. GELARDI
Deputy Clerk

Judgment of the District Court

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action File No. 62-C-1131

FILED
JUNE 13, 1966

TRELLSBORGS ANGFORTYGS A/S,

3rd Party Pltf.,

—against—

GOLTEN MARINE COMPANY, INC.,

3rd Party Deft.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Jacob Mishler, United States District Judge, presiding, and the issues having ben duly tried and the Court having duly rendered its verdict, in favor of the 3rd Party Pltf. Trellsborgs Angfortygs A/S.

It is Ordered and Adjudged that the 3rd Party Pltf. Trellsborgs Angfortygs A/S recover of the 3rd Party Deft. Golten Marine Company, Inc. the sum of $10,000.00 with costs when taxed. Also $3,500.00 for legal fees and disbursements. Making a total of $13,500.00

Dated at Brooklyn, New York, this 13th day of June, 1966.

LEWIS ORGEL
Clerk of Court

by MICHAEL J. GELARDI